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CHARLES ELMORE CRO
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 388

CITY OF CORAL GABLES, A MUNICIPAL CORPORATION, ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF FLORIDA, *Petitioner,*

vs.

ED. C. WRIGHT, DOING BUSINESS AS ED. C. WRIGHT & COMPANY, SUCCESSOR TO ED. C. WRIGHT & COMPANY, INC., AND AMERICAN NATIONAL BANK OF NASHVILLE, TENNESSEE, A NATIONAL BANKING CORPORATION, *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF AMICUS CURIAE.

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vs.

ED. C. WRIGHT, ET AL.,
Respondents.

BRIEF OF AMICUS CURIAE.

As amicus curiae, no complete statement of the facts in the case will be made, although a general outline of the proceeding will be brought to the attention of the Court for the purpose of giving as complete a picture as possible of this litigation.

The so-called Municipal Bankruptcy Act, known as Chapter IX of the Bankruptcy Act, (11 U. S. C. 401-403) was enacted on August 16, 1937, c. 657, 50 Stat. 655. The Act was amended on June 22, 1938, c. 575, 52 Stat. 930, by the addition of the so-called "Sub-section (j)" of Section 83 of said Chapter IX. This section was enacted by Congress to overcome a decision rendered by this Court on April 14, 1938 involving the City of West Palm Beach, Florida, 96 F. (2) 85, and it is under this section that the City of Coral

Gables is proceeding, although the Original 1937 Act was available to it when the so-called Plan was declared operative.

Statement of the Case.

The statement of the case set forth in the brief of the Respondents, as herein supplemented, is adopted as being fair and comprehensive.

The Statement contained in Petitioner's Brief fails to set forth that of the minority group of creditors that "had refused to settle on the proposed terms, to accept refunding securities of the same character and nature as had been accepted previously by 90% of its creditors of the same class", the City had settled with a number of creditors on different terms subsequent to the exchange and that at the time of filing the petition for composition in the District Court, included in the amount of outstanding unrefunded credits were credits aggregating over $157,958.26 (R. 901, 1628), with the holders of whom the City had agreed on a final plan of liquidation and payment and that the aforesaid amount represented the balance of said credits remaining unpaid under such agreements at that time. The creditor, Fiduciary Counsel, Inc., in whose interest this brief is filed, was an original investor in the securities of the City of Coral Gables before default.

Background.

Coral Gables, Florida is a suburb of the City of Miami and is undoubtedly one of the finest residential communities in the United States, as was aptly brought out in the testimony in the case. Like all of the other Florida communities, it be came involved in financial difficulties following the collapse in 1929, brought on by the Nationwide economic depression. This financial difficulty continued until 1937, when the so-called refunding operations were put into effect.

It is submitted that in dealing with the City of Coral Gables, the record reveals that you do not have a situation where, at the time of the filing of the petition, the City was overburdened with debt and taxes in ratio to its assessed valuation or with relation to other similarly situated communities. As a matter of fact, it is a highly verile community with taxpayers above the average ability to pay. As an example, of these facts, Witness John C. Donahue, appraisal expert, who testified on behalf of both the Petitioner and objection creditors, testified that he had made appraisal valuations for the Cities of Coral Gables, West Palm Beach, and Sanford, Florida. In addition to doing this work for the said Cities, he made studies to determine the level of value in refunding operations (R. 1071). He testified that the said Cities within a small reasonable variation were on or about the same tax assessment base (R. 1078), and cited the following example of the over-all comparative tax burden of the said three municipalities:

	City Taxes.	County Taxes.	Total.
In re bungalow, value $5,000:			
Coral Gables	$40.00	$22.50	$62.80
West Palm Beach	56.00	25.12	81.12
Sanford	69.75	20.00	89.75
In re business property, value $5,000:			
Coral Gables	102.30	88.59	190.89
West Palm Beach	158.10	65.88	205.38
Sanford	139.50	69.84	227.94

A number of Municipal Financial experts of State and national reputation testified that the credit and financial strength of the City at the time of the filing of the Petition in the District Court and for several years prior thereto, it could sell a special issue of bonds for par at reasonable interest rates sufficient in amount to pay the unexchanged indebtedness (R. 998, 1023, 1086, 1114, 1140). And that this could be accomplished with little or no increase in the City's

present rate of taxation. Various offers were made by creditors to take bonds in settlement and various plans of issues were suggested (Deft. Ex. 35, 38, 43, 44, 45; R. 1630, 1631, 1635, 1636, 1637, 1638).

On October 1, 1936, the City (R. 1519) passed a resolution appointing one Excelsen its exclusive representative to negotiate a debt refunding plan, thereafter on December 22, 1936 (R. 57-96) the so-called Ordinance No. 269 was adopted by the City, which Ordinance sets forth the terms and conditions under which refunding bonds would be issued to the holders of original securities in exchange for their securities. On December 24, 1936, the City likewise passed an ordinance in the form of a contract between the City and any credtior who might desire to cooperate for the delivery of these refunding securities (R. 1482-1516). This instrument followed the terms of Ordinance No. 269, and in addition provided a space at the end thereof by which a creditor could (R. 1516) bind himself to its terms. Paragraph 7 of this agreement (R. 1514) provided that the agreement should become operative when sufficient creditors had executed it (but in no event less than 90 per cent) to insure the City that it would be able to perform the covenants in the Refunding Bonds and make the plan for readjustment and refunding feasible and practicable. Thereafter, on February 3, 1937 (R. 1477), the City entered into an agreement with the so-called "Barker Committee", which agreement provided that the Committee would readjust the bonds represented by it in accordance with the terms of Ordinance No. 269, which had been previously adopted by the City on December 23, 1936. One portion of that agreement is very pertinent. It provides (R. 1478) that:

> "Neither the City nor the Committee will be obligated to readjust or refund the bonds and interest claims deposited with the Committee unless and until each determines to its own satisfaction and in its own discre-

tion that a sufficient amount of the outstanding indebtedness of the City is obligated to be readjusted and refunded under said Ordinance in order to assure the success of the proposed readjustment and refunding."

Thereafter, the bonds were validated by a decree of the Supreme Court of the State of Florida, *City of Coral Gables* v. *State*, 176 So. 40 (July 30, 1937). This decision required a correction to be made in Ordinance No. 269, not material here. On this same day, to-wit, June 30, 1937, the City entered into another contract with Excelsen (R. 1470-1477) by which Excelsen was to be paid a fee of approximately $80,000.00 for services rendered and to be rendered, a part of which were to be in (R. 1476):

> "A persistent and conscientious effort to negotiate special adjustment with those creditors who may not have consented to the refunding plan at the time the same is declared operative, it being understood that each of such special adjustments is to be dealt with specially by the City Commission after the same has been negotigated to a point where the greatest saving can be effected and the most favorable terms to the City developed."

In August, 1937, the present Municipal Bankruptcy Act was enacted (11 U. S. C. 401-403). The Plan was declared operative and the exchanges were made in September, 1937, a month after the enactment of the Act, and when it was entirely available to the City, and the 90 per cent. of creditors, either represented by or dominated by the "Barker Committee." Mr. Shaw, the City Clerk, testified that the Plan became operative in September, 1937, and obviously under its terms it could not become operative until 90 per cent. of the creditors had accepted it. Thus we have a situation where the Act was available to the City, where 90 per cent. of the creditors had agreed to take the Refunding Bonds, where a contract was in existence with a "Fiscal

Agent" of the City to make special deals with all creditors who would not accept the Plan. With all these facts before it, the City elected to voluntarily exchange its bonds rather than submit itself, the Barker Committee and its fiscal agency contract to the Court for approval at that time. As a matter of fact, Mr. Adams, the City Attorney, (R. 1737-1738) admitted to the lower court that the City at that time had contracts under which it could not go into bankruptcy, and under this situation "the City elected, as it had a right to do, to go ahead and carry out its plan for a voluntary refunding of its indebtedness, and it did go ahead in September * * *."

It was after the first exchange of more than 90 per cent. of the bonds in September, 1937, that the various trades were made by Excelsen for the City with many creditors who would not take the Refunding Bonds and Tax Participation Certificates (the latter being practically worthless at the time of the exchange). Defendant's Exhibits 47 and 48 (R. 1639-1640) show the cash paid by the City to these various creditors who would not consent to the Plan. and it shows these various trades, which were made from October 18, 1937, through December 15, 1938. By way of illustration, note the stipulation signed and filed in the United States District Court on October 19, 1937, by the City in the judgment case wherein Fiduciary Counsel, Inc., had sued the City and recovered a judgment on July 26, 1937, in the sum of $130,878.21. The City agreed by the stipulation (R. 1715-1718) that this judgment would be paid off in cash over a period of years and further agreed (R. 1717)

> " * * * that it will not invoke, or cause to be invoked, the terms of the U. S. Public Act, No. 320, Chapter 657, approved by the President of the United States on August 16, 1937, generally known as the 'Municipal Bankruptcy Act', an amendment to the 'Federal Bank-

ruptcy Act', during the time this stipulation is in effect."

The consideration flowing to the City being a modification of the Court's order requiring payment over a period of six years, with 5% interest on unpaid balances to payment over a period of 12 years with interest on unpaid balances of 3% (R. 1715-1718).

From the time of the first exchange in September, 1937, when over 90 per cent. of the indebtedness was exchanged, until the time of the filing of the petition, the City was negotiating with the respondents in this case. These negotiations had gone so far, as a matter of fact, that an actual tentative agreement was drawn up, a resolution authorizing its execution was actually voted to be passed by the City Commission (this agreement appears on page 1631), and according to the testimony of Mr. Roberts (R. 1091), the City was perfectly willing to agree to that settlement, but they wanted the unanimous consent of the City Commission. Thereupon, the one member who was absent was called and apparently his consent was not given to the agreement, but nevertheless a majority of the other Commissioners, subject to a unanimous vote according to the uncontradicted testimony, had agreed to the execution of the agreement for the refunding of such claims at terms inconsistent with and far more favorable than the terms of the Refunding Bonds, as authorized by Ordinance No. 269, and under terms different from those which the City had made with other creditors. The testimony is clear that in 1940 the City, following the failure of this negotiation, circularized all of its bondholders and owners of the so-called tax participation certificates with form letters, advising that over 90 per cent. of the debt had been refunded, and that negotiations with "hold-outs" had failed, and that the City wanted to avail itself of the Bankruptcy Act, that such proceeding

would not affect the consentors in any manner, but would force the objectors to take what the consentors had taken (R. 257-259). One letter pointed out that over 90 per cent. of the creditors had consented to the refunding, that some have reduced their claims to judgment, and that the holders of the remaining "have not seen fit to cooperate." The letter further states (R. 1574):

> "The City Commission is not willing to grant these few non-consenting creditors a better settlement than that which you accepted, and that negotiations with these 'hold-outs' having failed, to complete the refunding the City is compelled to avail itself of the Municipal Bankruptcy Act."

The letter further states:

> "Municipal Bankruptcy proceedings cannot and will not change the terms of the Refunding Bonds or Tax Participation Certificates which you hold. The result will apply only to those unrefunded bonds."

The letter further states:

> "There is no doubt of the City's ability to meet the requirements of the refunding securities, unless such excessive taxes forced upon us by the unrefunded bonds adversely affect tax collections."

With this letter the City sent a form to be filled in by the owner and returned to the City (R. 259-260). This form was to trace the ownership of the bonds, and specifically provided that the owner would agree to vote in the bankruptcy proceedings (R. 260):

> "With the understanding that there will be no obligation on my part for the expense of the proceedings, and no other financial obligation of any nature, and it will not be necessary to surrender possession of my bonds and tax participation certificates of the issue of January 1, 1937, I assent to the filing of the municipal bank-

ruptcy proceedings by the City of Coral Gables as the necessary means of completing the refunding, and will sign formal consent thereto when sent me by the City."

Throughout the entire proceedings in the District Court and in the briefs of the Petitioner, emphasis is made of the fact that creditors will profit above their investment in the event of the failure of the City's composition proceedings. We submit that this is not a fair reflection of the status of dissenting creditors generally. As to the Fiduciary Counsel Inc. (R. 1688), it is entirely a matter of salvage. This party, as were a number of others, was an original investor in Coral Gables securities.

ARGUMENT.

I. Can a Municipal Corporation After Adopting a Voluntary Plan of Composition Subsequently Abandon, Modify, or Alter the Same and Then Undertake to Enforce the Original Plan under the Authority of Subsection (j), Sec. 83 of Chapter IX of the Bankruptcy Act?

It appears to be the theory of the petitioner that the majority of opinion of the Circuit Court of Appeals in the instant case will nullify the provisions of the referred to subsection (j). Exception is taken to this. It is submitted that this decision simply prevents an abuse under said subsection of the Act.

The cases cited in Petitioner's brief are not pertinent to the instant case. The instance wherein a preference was granted to one creditor in the El Dorado District case took place more than a year prior to the filing of the District's plan of composition in the bankruptcy court and before the plan of composition submitted to the court had been evolved. *Thomas* v. *El Dorado Irr. Dist.*, 9 Cir., 126 Fed.

(2) 922, certiorari denied, 317 U. S. 660, 87 L. Ed. 42, 63 S. C. 59.

In each of the following cases cited in Petitioner's brief, the plan before the Court was the amended plan—not the original plan after the abandonment thereof or departure therefrom. *Ouerbacher* v. *Henderson County*, 4 Cir., 126 Fed. (2) 309, certiorari denied, 317 U. S. 654, 87 L. Ed. 40, 63 S. C. 51. *Wells Fargo Bank and Union T. Co.* v. *Imperial Irr. Dis., et al.*, 9 Cir., 136 Fed. (2) 539, 547-8 (petition for certiorari pending).

The abuse prevented by the Circuit Court of Appeals in the instant case is:

a. That the subsection is used to coerce one group of creditors to compromise under the original plan after it has been departed from and abandoned.

b. To diminish the value of credits held by Fiduciary Counsel Inc., and others similarly situated, existing by virtue of a special refunding agreement made with the City with the consent of creditors now holding refunding securities or their predecessors in title, by nullifying the said special refunding agreements and coercing them to exchange the balance due on their original credits for refunding bonds issued under the original voluntary plan of composition.

It is submitted that the bankruptcy court only has jurisdiction under Section 83(j) of Chapter IX of the National Bankruptcy Act, when the petitioner has conducted its affairs and negotiations within the spirit as well as the letter of the law. We believe this statement to be the rule laid down by the Circuit Court of Appeals of the Fifth Circuit in reviewing the case at bar.

II. Can a Municipal Corporation With Sufficient Credit and Financial Strength to Borrow Money to Pay Its Unrefunded Obligations, Undiminished, Compose Said Obligations At a Loss to the Holders Thereof?

a. When it canvasses creditors' holding refunding bonds, soliciting their voting consents, not on a basis of financial necessity, but on a basis of preventing the so-called "hold outs' from getting an alleged preference over those from whom consents are sought;

b. When the consenting creditors or their predecessors in title have consented to the so-called preferential treatment of minority creditor groups; and

c. When the consenting creditors are assured that the securities they hold will not be affected, nor be subjected to any obligation.

The fact that by ordinary business administration and operation the City could have sold an issue of bonds at that time and paid off every single past due bond or coupon has been totally ignored. This fact was clearly demonstrated by the testimony of Bradford (R. 998, et seq.), the testimony of Wainwright (R. 1023, et seq.), the testimony of Marley (R. 1045), the testimony of Daugherty (R. 1140), and the testimony of Roberts (R. 1186). As a matter of fact, Roberts, a bond man, stated that he was willing to make an offer for the unrefunded indebtedness, but the Master said that the offer on the part of Roberts was immaterial.

Thus the queestion is whether or not the City can refuse to exercise good faith in attempting to extricate itself from its indebtedness at the time of the filing of the petition, and just do nothing, then flood the holders of its refunding bonds with form letters asking consents to use the Bankruptcy Act as a club over the holders of its unrefunded indebtedness, and force them to take securities of far less value than agreements previously made by the City with other credi-

tors who likewise would not agree to take the Plan. It is respectfully submitted that Sub-section (j), 11 U. S. C. 403 (j), under which the City is now attempting to force the least valuable settlement it has previously made (it having made 25 or 30 separate settlements with other creditors on more favorable terms than those attempted to be forced upon those who failed to negotiate with the City on its terms) does not change the other provision of the Bankruptcy Act. This section means that insolvency or inability to meet the indebtedness of the City is to be determined at the time of filing of the petition, and not at some undeterminate time in the past. The question of the insolvency of the taxing unit was raised in the case of *Fano* v. *Newport Heights Irrigation District, et al.*, (C. C. A. 9) (1940), 114 F. (2) 563. In that case the Court said (p. 564):

> "The problem for solution in this case is simply one of facts, to-wit, at the *time of the filing of the petition was the district insolvent or unable to pay its debts as they fell due, and if so, is the proposed plan fair?*"

The Court then pointed out that it was undoubtedly true that the district did not have funds to fully pay the due interest, and in that sense is insolvent, but that the district was far from insolvent in the bankruptcy sense, the Court saying that it could by no reason see why:

> "The tax rate should not have been increased sufficiently to meet the district's obligation or why it can be said that the plan is 'equitable and fair' and for the 'best interest of creditors', with no sufficient showing that the taxing power was inadequate to raise the taxes to pay them."

By the very same reason it is indeed hard to understand why the City of Coral Gables did not, could not, and would not at the time of the filing of the petition (and even at the present time when municipal bond market is the highest at

any time in the history of the State of Florida for the past ten years) float an issue of bonds of any rate available and readjust the outstanding unrefunded indebtedness. It is quite different being able to pay one's indebtedness by the usual ordinary business operation, and being unable to pay one's indebtedness because one does not even attempt to do so. That is the situation with the City of Coral Gables, Florida. The uncontradicted testimony shows that at the time of the filing of the petition the City could easily have issued refunding bonds for the small percentage of outstanding unrefunded securities, and in this connection this Court's attention is directed to several similar situations in the State of Florida.

As a first illustration, the Court will recall that in the first West Palm Beach case, *In Re West Palm Beach*, 96 F. (2) 85, the lower court dismissed a petition for confirmation of the Plan of Composition, because the consents attached thereto were those of creditors who had accepted refunding bonds. On appeal to this court the order of dismissal was affirmed. Thereafter Congress amended the Bankruptcy Act so as to include the so-called Sub-section (j), 11 U. S. C. 403 (j). It is further interesting to note, and the Court will recall from a previous proceeding, in the case of *Block* v. *West Palm Beach*, 112 F. (2) 949, the City of West Palm Beach entered into a contract with the holders of the unrefunded indebtedness of that City to issue them refunding bonds on terms far more favorable than those accorded other creditors. A consentor to the original plan and the holder of a refunding bond brought suit in the United States District Court for the Southern District of Florida to enjoin the City from carrying out its contract, contending that it had agreed to a certain plan, that the City had agreed not to violate it, and therefore he should be placed back as the holder of an original bond. The District Court dismissed the proceeding, and this Court

affirmed it, 112 F. (23 949. The matter again was litigate in *State* v. *West Palm Beach*, 193 So. 839, the Suprem Court of Florida holding that the City could refund the sma amount of unrefunded indebtedness on terms different fro those it had offered over 90 per cent. of the creditors of th City. In the instant case, refunding agreements with ap proximately 25 or 30 creditors have been made, and now th City attempts to come back into Court, wash its hands of a of those transactions and attempts to force on the sma minority terms far less than the best terms it has offered t other creditors. At the time of the filing of such petition, i was in such a position that it could have issued refundin bonds for this outstanding indebtedness, as was done by th Cities of West Palm Beach, Sanford, Sarasota and Lake land, Florida. Incidentally the City of West Palm Beac filed a petition in bankruptcy, asking for the confirmatio of a plan to refund this small unrefunded balance. Th Honorable John W. Holland confirmed and approved tha plan by an interlocutory decree.

Another similar situation is the case of Bay County, Flor ida. That case was filed in the United States District Cour for the Northern District of Florida, Marianna Division under Case No. 83-M-Bankruptcy. The County attempte to compel the objecting creditors to take a plan in 1940 a of 1932. The District Court found that such a plan wa not fair and equitable, not for the best interest of creditors and dismissed the proceeding. One of the findings of fac by the Court in its order of January 6, 1940, is as follows:

> "The economic and financial condition of the County ha been materially changed since 1932, its population an the value of the property in the County have increased the general business conditions are better. The 194 session of the Legislature of Florida enacted laws in creasing materially the amount of gasoline tax appro priated to the County by the State to aid it in carryin its road bonds. In 1939 the County received from thi

source approximately $185.00, being $85.00 more than the amount estimated from that source in the plan of 1932; since 1932 the County has retired $624,400. of its bonds and a large amount of past due interest, which was then outstanding; the indebtedness existing in 1932 being correspondingly reduced. The credit of the County now is such that, during the pendency of these proceedings it was able to obtain a contract to purchase a new issue of refunding bonds bearing 3, 3¼, 3½ per cent. interest for cash in amounts sufficient to pay on February 1, 1941, all of the outstanding refunding bonds issued under the plan of 1932. The underwriters in that contract are charged with knowledge of the existence of the amount of unrefunded bonds and accrued interest thereon."

Thus it is that the Federal Court determined that the unrefunded securities in the City of West Palm Beach could be refunded on a basis different from that which other creditors had voluntarily agreed to, that this same procedure was followed in the City of Sanford, the City of Sarasota, and even in Bay County, where the Court determined that the economic conditions had so changed at the time of filing the petition (the county actually having received an offer to buy bonds and thereby pay off its indebtedness). Likewise Coral Gables was tendered an offer in this proceeding, which the Master said was clearly immaterial, so that the position that creditors now find themselves in is that the City has, like an ostrich, buried its head in the sand and refused to take any steps whatsoever to extricate itself from a simple solution of its unrefunded bonded indebtedness.

Forfeiture and diminution of rights is a harsh remedy repugnant to the court, and only resorted to when necessary to protect and benefit a class of parties as a whole, where there is an identity and mutuality of interest. *Re City of West Palm Beach,* 5 Cir., 96 Fed. (2d) 85.

The case of *Kaufman Co. Levee Imp. Dist. No. 4* v. *Mitchell*, 5 Cir., 116 Fed. (2) 959 is an example of the rule that the administration of a municipal bankruptcy act must be within the spirit as well as the letter of the law. There is nothing in the act preventing the voting of consents by bondholders who are taxpayers. However, under the circumstances of the above case, such voting would have been unfair. There was not the mutuality or the identity of interest between creditors to permit, without discrimination, counting the voting consents of the creditors who were also landowners.

It is not to be fairly assumed that

> "Holders of the refunding bonds and T. P. C.s who consented in the bankruptcy proceedings were in the main the same individuals who held old bonds and voluntarily exchanged them." (Petitioner's Brief p. 26, para. 12).

The established public market in Coral Gables bonds has been so broad and notoriously active in the trading of these securities since the original exchange in 1937, that such a circumstance would be impossible.

Conclusion.

In conclusion, therefore, it is respectfully submitted that in the instant case the identity and mutuality of interest between consenting and dissenting creditors, necessary and indispensable to the jurisdiction of the court, is lacking because:

> a. The financial condition of the City was not such that the composition under the Act was necessary for the protection of either the City, the holders of refunding securities, or the holders of unrefunding securities.

b. The interests and securities of the consenting creditors were in no manner to be affected by the outcome of the litigation incident to this composition.

c. The so-called preferences were made under various plans of composition (not incorporated in the petition filed by the Petitioner herein in the District Court) adopted by the City subsequent to the completion and abandonment of the original voluntary plan of composition and said plans providing for the liquidation of the indebtedness of the various creditors, were adopted and put into execution with the full consent of the holders of refunding securities or their predecessors in title, who now vote to nullify said special agreements in an attempt to subject the balances remaining unpaid, pursuant to said agreements, to the terms of the original voluntary refunding plan.

Respectfully submitted,

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Fla.